FEDERAL COURT OF AUSTRALIA

Scargill v Minister for Immigration and Multicultural and Indigenous Affairs

[2003] FCAFC 116

French, von Doussa and Marshall JJ

13 May, 3 June 2003

Immigration — Visas — Family (Residence) (Class AO) visa — Criteria for — Applicant remaining relative — Disqualification from being — Usually resides in same country, not being Australia, as overseas near relative — Usually resides — Elements of — Migration Review Tribunal failing to address proper meaning of "usually resides" and deciding applicant disqualified — Error of law — Decision not privative clause decision — Migration Regulations 1994 (Cth), reg 1.15(2)(a)(i).

Words and Phrases — "Usually resides" — Migration Regulations 1994 (Cth), reg 1.15 (2)(a)(i).

An applicant for the relevant visa had to be a remaining relative of one who was a settled Australian permanent resident, usually resident in Australia, who nominated the applicant for the grant of the visa. The *Migration Regulations 1994* (Cth), in reg 1.15, defined "remaining relative". Partly, reg 1.15 provided:

> (2) An applicant is disqualified if:
>
> (a) the applicant …
>
> (i) usually resides in the same country, not being Australia, as an overseas near relative …

"Overseas near relative" was defined to include a parent of the applicant.

The applicant was born in the UK in 1974. His parents divorced in 1981. Before the divorce and since, he and his mother had no contact with his father. He and his mother went to the USA and from 1993 lived there. In 1998 he entered Australia on a visitor's visa. Before the visitor's visa expired he applied for the relevant visa and afterwards lived with his mother. Throughout, he was lawfully in Australia. At the time of the hearing before the Migration Refugee Tribunal (the Tribunal), he had been in Australia for four years. He had no continuing ties with the USA and no intention to return to the USA.

It was assumed, but not shown, that the applicant's father was alive and in the UK. In the UK lived a grandmother and an uncle of the applicant neither of whom was an overseas near relative as defined.

The applicant's mother, a settled Australian permanent resident, usually resident in Australia, nominated the applicant for the grant of the visa.

The Tribunal found the applicant was disqualified within reg 1.15(2)(a)(i) because he usually resided in the UK, the country with which he had greater ties

than the USA and in which his father resided. The Tribunal considered to be decisive the applicant's birth in, and citizenship of, the UK, and the presence there of the grandmother and uncle.

Before the High Court published its judgment in *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454, the judge held, without going to the merits, that, by s 474(1) of the *Migration Act 1958* (Cth) (the Act), the Tribunal's decision was not reviewable. On appeal,

Held, by the Court: (1) The Tribunal failed to consider physical residence and intention which are essential elements in the notion of "usually resides". The finding that the appellant usually resided in the UK was not open. [21], [25], [27], [31]

Gauthiez v Minister for Immigration and Ethnic Affairs (1994) 53 FCR 512 at 521, approved.

(2) In failing to address the proper meaning of "usually resides" and reaching a conclusion incapable of supporting the finding made, the Tribunal erred in law. [26], [31]

Gauthiez v Minister for Immigration and Ethnic Affairs (1994) 53 FCR 512 at 521, approved.

(3) In reg 1.15(2)(a)(i) "not being in Australia" makes clear that an overseas near relative whose place of residence may disqualify an applicant is an overseas near relative who does not usually reside in Australia. The regulation did not require the lawful presence of the appellant to be left out of account in considering where the appellant usually resided. [30]

Gauthiez v Minister for Immigration and Ethnic Affairs (1994) 53 FCR 512 at 521, explained.

(4) There was a constructive failure by the Tribunal to exercise the jurisdiction vested in it. The failure made its decision not one made under the Act and, so, not one protected by s 474(1). [37]

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441 at [71]-[83]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [76]-[78], applied.

Appeal against decision of Heerey J, *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1523, allowed.

Cases Cited

Alphapharm Pty Ltd v Smithkline Beecham (Australia) Pty Ltd (1994) 49 FCR 250.

Gauthiez v Minister for Immigration and Ethnic Affairs (1994) 53 FCR 512.

Immigration and Multicultural and Indigenous Affairs, Re Minister for; Ex parte Applicants S134/2002 (2003) 211 CLR 441.

Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation (1941) 64 CLR 241.

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 123 FCR 298.

Norman v Norman (No 3) (1969) 16 FLR 231.

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476.

Taxation, Commissioner of v Miller (1946) 73 CLR 93.

Appeal

L De Ferrari, for the appellant.

C Moran, for the respondent.

Cur adv vult

3 June 2003

The Court.

1 This is an appeal from the decision of a single judge of this Court (the primary judge) who dismissed an application under s 39B(1) and (1A)(c) of the *Judiciary Act 1903* (Cth) for orders in relation to a decision of the Migration Review Tribunal (the Tribunal) dated 3 May 2002. The decision of the Tribunal affirmed a decision of a delegate of the Minister not to grant the appellant a Family (Residence) (Class AO) visa. The appellant had applied for the visa on the basis that he was a "remaining relative" of his mother, Lynn Clara Scargill, who at all relevant times has been an Australian permanent resident.

2 The delegate of the Minister, and on review the Tribunal, found that the appellant did not come within the definition of "remaining relative" contained in reg 1.15 of the *Migration Regulations 1994* (Cth). Before the primary judge, the appellant contended that the Tribunal had fallen into error of law in its application of the definition of "remaining relative", and sought to have the decision of the Tribunal set aside. However, his Honour held that the Tribunal decision was a "privative clause decision" as defined in s 474(2) of the *Migration Act 1958* (Cth) (the Act), and, by operation of s 474(1), the decision of the Tribunal could not be reviewed on the ground of the errors of law alleged by the appellant. Accordingly, the application for review was dismissed without consideration of the merits of the alleged errors.

3 The decision of the primary judge was handed down after the decision of the Full Court of this Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, and before the delivery of judgment by the High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The High Court placed a more limited interpretation on the scope and operation of s 474 than had been given to the section by the majority of the Full Court in *NAAV*. The High Court held that if a decision involves a failure to exercise jurisdiction or an excess of jurisdiction conferred by the Act, the decision is not one made "under this Act" within the meaning of s 474(2), and therefore is not a "privative clause decision" protected by s 474(1) from review.

4 Before this Court the appellant renewed his argument that the Tribunal fell into errors of law in the application of the definition of "remaining relative", and contended that the errors constitute a jurisdictional error of the kind not protected by s 474(1).

5 The respondent acknowledged that in light of the reasons of the High Court in *Plaintiff S157*, the appellant's application for review should not have been dismissed without consideration of the errors alleged by the appellant. However, the respondent contended that the Tribunal did not fall into error. Moreover the respondent contended that the decision of the Tribunal rested on a finding that the appellant usually resides in the United Kingdom; that the term "usually resides" is a non-technical expression of ordinary meaning; and the finding was one of fact, not a reviewable error of law.

6 It is not disputed that the appellant's application for a visa was validly made. Section 65(1) of the Act provides that the Minister (or on review, the Tribunal:

see s 349 of the Act), if satisfied as to the matters stated in a valid application is to grant the visa, or if not so satisfied is to refuse to grant the visa. If so satisfied, the grant of the visa is not discretionary; the grant of the visa must occur.

7 The matters about which the Minister (or the Tribunal) must be satisfied include the criteria prescribed by the Act or the Regulations for the kind of visa for which application is made: s 65(1)(a)(ii).

8 The Migration Regulations in force at the time of the appellant's application prescribed criteria for the relevant visa in Sch 2, Subclass 806. The criteria required, at the time of the application for the visa (in this case 24 July 1998) and at the time of the decision on the application (in this case 3 May 2002, being the date of the Tribunal decision), that:

> The applicant is … a remaining relative of … another person who:
> (a) is … a settled Australian permanent resident … and
> (b) is usually resident in Australia; and
> (c) has nominated the applicant for the grant of the visa.

9 The appellant's mother nominated the appellant for the grant of the visa. She is a person who met the requirements of paras (a), (b) and (c). The contentious issue is whether the appellant was a "remaining relative".

10 Regulation 1.15 defined a "remaining relative" in the following way:

> Remaining relative
> (1) An applicant for a visa is a remaining relative if the applicant has a relative who:
> (a) is:
> (i) a brother, sister or parent; or
> (ii) a step-brother, step-sister or step-parent;
> of the applicant; and
> (b) is:
> (i) an Australian citizen; or
> (ii) an Australian permanent resident; or
> (iii) an eligible New Zealand citizen; and
> (c) is usually resident in Australia;
> (2) An applicant is disqualified if:
> (a) the applicant or the spouse (if any) of the applicant:
> (i) usually resides in the same country, not being Australia, as an overseas near relative; or
> (ii) has had contact with an overseas near relative during a reasonable period preceding the application; or
> (b) the applicant and the spouse (if any) of the applicant together have more than 3 overseas near relatives; or
> (c) the applicant is a child who:
> (i) has not turned 18; and
> (ii) has been adopted by an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen (in this paragraph called *the adoptive parent*) while overseas;
> but, at the time of the application, the adoptive parent has not been residing overseas for a period of at least 12 months.
> (3) In this regulation, *overseas near relative* means a person who is:
> (a) a parent, brother, sister or non-dependent child; or

> (b) a step-parent, step-brother, step-sister or non-dependent step-child;
> of the applicant or of the spouse (if any) of the applicant but is not a relative of a kind referred to in subregulation (1).

11 The Tribunal found that the appellant was not a "remaining relative" as he was a disqualified person under reg 1.15(2)(a) because he usually resided in the UK where his father also resided.

12 The appellant was born in the UK, in Manchester, in 1974 and is a citizen of that country. His father deserted the family when he was a few months old. His parents were divorced in October 1981. Neither the appellant nor his mother have had contact with his father for more than 25 years although, in evidence before the Tribunal, they said they presumed he was still alive, living in Manchester. As a teenager the appellant visited the USA with his mother and, at the age of about 19, he went to live there. He married a USA citizen, acquired a residency visa, and obtained a USA social security number. However, he was divorced on 20 April 1998, shortly before coming to Australia where he arrived on 6 May 1998. He entered Australia on a visitor's visa valid until 6 August 1998. Before that visa expired he applied for the visa now in question. Since his visitor's visa expired he has remained lawfully in Australia on a bridging visa. At the time of the Tribunal hearing he had therefore been living in Australia for four years.

13 The application for the visa was made on 24 July 1998, about two and a half months after the appellant arrived in Australia. In that application he stated that his country of usual residence was the USA, and he disclosed that he held a UK passport with an expiry date of 23 August 1999.

14 In his application for review of the delegate's decision by the Tribunal, the appellant said that he did not usually reside in the UK and had been residing in the USA from 1995-1998. However, the appellant's passport, produced to the Tribunal, contained an endorsement indicating that he arrived in the USA in 1993. Papers relating to his divorce in the USA also disclosed that he was married there on 22 January 1994.

15 In evidence before the Tribunal the appellant said that he had obtained a temporary visa to enter the USA that enabled him to stay there for five years. The visa endorsement shows that that period ended on 1 September 1998. The appellant said that he was no longer entitled to return to the USA as he had been absent for more than 12 months. As he had not lived there for a period of seven years he was not entitled to obtain USA citizenship. He said he had no continuing ties with the USA and had no intention of returning there. His UK passport had expired. About two years previously he had sought an application to renew the passport but had not done so as he could not afford the fee. He said that he had a maternal grandmother and an uncle still living in Manchester.

16 After referring to criteria that must be satisfied for the grant of a Subclass 806 visa, and to reg 1.15, the Tribunal identified the test to determine where a person "usually resides". The Tribunal then addressed the facts of the matter. The Tribunal said (at [27]-[30]):

> "Resides" is not defined under the Migration Act or Regulations. The Tribunal, therefore, must have regard to both relevant policy considerations and judicial comment.
>
> In *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241, the Court indicated that there are two elements that must be present

> to find that a person is "usually resident." The first is a physical presence in a particular place and the second is an intention to treat that place as home for at least the time being but not necessarily forever.
>
> A simplified test to the question of "usually resides" is "whether the person has retained a continuity of association with the place, together with an intention to return to that place and an attitude that the place remains *home*". See *Norman v Norman (No 3)* (1969) 16 FLR 231 at 236.
>
> In this case the visa applicant has retained his citizenship of the United Kingdom. Citizenship and residence are distinct concepts although, of course, in common experience most people usually reside in a country of which they have citizenship. He has stated that the purpose he had in going back to the United States for his last stay was to visit friends. He stated that he then married in order to obtain residency in the United States and has lived and worked there. He gave evidence of having no ties in the United States and now believes that he has no entitlement to return. He has, however, maintained a United Kingdom passport until it expired in 1999 because he could not afford to renew it and had indicated his intention to retain it by obtaining the necessary form from the British Consulate. He remains a British citizen and has in the United Kingdom his maternal grandmother and his step uncle who he has named in his passport as a contact in an emergency. Having regard to the evidence presented, including the evidence in the hearing, the Tribunal finds that the visa applicant left the United States without any ties to that country nor with any intention of returning to it and that this continued to be the situation as at the time of application. The Tribunal finds that the visa applicant did not at that time retain, nor does he currently retain, a continuity of association with the United States nor an intention to return there, nor did he regard the United States as "home". The ties are rather with the United Kingdom, which in the overall circumstances presented, the Tribunal finds is the country in which he usually resides. The Tribunal also finds, on the balance of probabilities, and taking account of the evidence of the visa applicant and the nominator at the hearing that the country in which the visa applicant's father usually resides is also the United Kingdom. The Tribunal finds, therefore, that the visa applicant is disqualified from being a remaining relative pursuant to regulation 1.15(2)(a) and so does not satisfy clause 806.213 in that he is not a remaining relative.

17 It is not contended by either party before this Court that the Tribunal erred in formulating the test which should be applied to determine under reg 1.15(2)(a) where the appellant "usually resides". In *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241, to which the Tribunal referred, Williams J, with whose reasons Rich ACJ and McTiernan J expressed agreement, made the following observation that is pertinent to this case, (at 249):

> The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode: see *Halsbury's Laws of England*, 2nd ed, vol 17, pp 376, 377.

Although the Tribunal articulated a test to determine where the appellant "usually resides", the elements of that test were not applied by the Tribunal in para 30 to arrive at the conclusion that the appellant usually resides in the UK. The Tribunal reached the conclusion which it did because the appellant was, and remained, a British citizen, because he had a maternal grandmother and uncle

still residing there, and because his ties were rather with the UK than the USA, a country with which he had severed connections and to which he had no intention of returning.

18 It is surprising that no information was sought from the relevant UK authorities to ascertain whether the appellant's father was still alive. The appellant and his mother simply assumed that to be the case, and the Tribunal has based its finding on that unsatisfactory evidence. Nevertheless, the finding that the father was still alive is a finding of fact for which there was some basis in the material before the Tribunal, and it is not a finding that is open to review. Moreover, the appellant has not challenged that finding.

19 The appellant contended that the Tribunal fell into error of law in the following respects:

- by failing to consider the applicable criteria at the time of the application but rather concentrated upon the situation at the time of the hearing;
- by applying a wrong test of "usually resides"; and
- by failing to apply binding legal authority, namely the decision of Gummow J in *Gauthiez v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 512.

Was there a failure to consider the criteria at the time of the application?

20 The reasoning of the Tribunal is directed almost entirely to the situation as it was disclosed to the Tribunal at the time of the hearing, but we do not think it follows that the Tribunal overlooked the situation at the time of the application. The Tribunal found that from the time the appellant left the USA he did not retain, nor did he currently have any continuing association with that country, nor an intention to return there. That finding covered both the relevant dates for the purpose of applying the criteria in Subclass 806. Further, the finding that "The ties are rather with the United Kingdom" is a finding that we think was intended to cover the whole period from the time the appellant left the USA. We do not think the Tribunal fell into the error alleged, but in any event, it is not an error that would assist the appellant, as the criteria require that the appellant was a "remaining relative" both at the time of the application and at the time of the decision.

Was a wrong test of "usually resides" applied?

21 We have already observed that the Tribunal did not apply the test propounded in paras 28 and 29 of its reasons in finding that the appellant "usually resides" in the UK. It applied a test that made decisive the combination of three matters, namely that the appellant was born in the UK, that he remained a citizen of the UK, and that by reason of him having a maternal grandparent and an uncle in the UK he had greater ties with that country than the USA. In our opinion, in so deciding, the Tribunal failed to consider the factors of physical residency and intention which are essential elements in the notion of "usually resides". *Gauthiez*, which the appellant's counsel relies on to support the third, and different, limb of her submissions is also instructive on this limb. *Gauthiez* concerned the meaning and application of a regulation that is not relevantly different to reg 1.15. Mr Gauthiez was born in France in 1953 and from then until moving to Belgium in 1972 lived partly in France and partly in French Guinea. In 1981 Gauthiez's sister and parents came to Australia and became Australian citizens. Gauthiez entered Australia on 24 January 1986 and was

granted a temporary entry permit valid to 24 April 1986, since when he remained in Australia unlawfully. On 26 October 1990 he applied for an Extended Eligibility (Family) Entry Permit which was refused by a decision of the Minister's delegate. That decision was affirmed by a decision of the Immigration Review Tribunal on 20 December 1993. Thus, at the date of the application for a visa the applicant had been unlawfully in Australia for approximately three and a half years, and by the time of the Tribunal's decision, unlawfully in Australia for more than six and a half years.

22 The Tribunal held that Gauthiez's country of residence was not Belgium as he contended because there was no evidence that since coming to Australia in 1986 he had maintained "any ties with that country". The Tribunal held that he usually resided in France where his brother also resided, thus he was disqualified as a "remaining relative". The Tribunal considered three matters taken together pointed to France as the country of residence, namely he was born and grew up there, and he was a French citizen.

23 Gauthiez applied to the Federal Court to review the Tribunal's decision. Gummow J, in reliance upon authorities discussed by him (at 519-521), held that in considering where an applicant "usually resides" for the purpose of the regulation, the applicant cannot rely on unlawful residence in Australia as constituting "usual residence". His Honour noted that the Tribunal, correctly, left out of account the illegal presence of Gauthiez in Australia from the time his temporary entry permit expired on 24 April 1986.

24 Gummow J held that the Tribunal fell into error of law in concluding that Gauthiez usually resided in France. His Honour held that the fact that the applicant was born in France and grew up partly in France and partly in French Guinea were, in the circumstances of the case, matters of historical tie and no more. His Honour said (at 521):

> His citizenship was an enduring link with France. But citizenship and residence are distinct concepts although, of course, in common experience most people usually reside in a country of which they have citizenship. Nevertheless, in my view, and as a matter of law, the mere circumstance that the applicant retained his French citizenship could not, without more, indicate that he was a resident in France. Accordingly, there was an error of law by the Tribunal which is reviewable in this proceeding.

25 In our opinion that reasoning applies directly to this case. The fact that the appellant was born in the UK and lived there until about 1993 were matters of historical tie but, without more, those matters said nothing about the appellant's current place of abode or his intentions. His citizenship was a factor to be taken into account, but again, required other evidence to lead to an inference that he usually resides in the UK. In the circumstances of this case, we consider there was no other evidence, and the finding that the appellant "usually resides" in the UK was not open on the material before the Tribunal.

26 Gummow J also considered the question whether a finding as to the place where an applicant "usually resides" is a reviewable finding of fact. His Honour said (at 519):

> The meaning ordinarily given to the phrases "resides", "usually resides" and "ordinarily resides" is such as to make the result in a given case depend largely upon matters of fact and degree. That means that if, in the reasons of a body such as the Tribunal, no misapprehension of the meaning of the provision in question is disclosed, and no misconception appears as to what may amount to "residence" or

> "usual residence", the decision will not involve a question of law. This will be so unless the facts before the Tribunal were incapable of the legal complexion placed upon them: *Commissioner of Taxation v Miller* (1946) 73 CLR 93 at 104, per Dixon J.

In our opinion the reasons of the Tribunal in this case disclose that in reaching its conclusion it failed to address the proper meaning of "usually resides" and reached a conclusion that was incapable of supporting the finding which it made. Hence it fell into error of law.

27 There is an important factual difference between the circumstances considered in *Gauthiez*, and the present case. In *Gauthiez* the visa applicant had been in Australia, living here, for a substantial period, but his presence during that time was left out of account as it was an illegal presence upon which he could not rely for the purpose of supporting a visa application. In the present case, the appellant's presence in Australia after he left the USA was lawful. He entered Australia on a temporary permit as a visitor, suggesting that at the time of his entry he may not have had a firm intention to reside in the future in Australia. However, after two and a half months, he made an application for a visa which assumes such an intention, and thereafter he lived in Australia with his mother. Had the Tribunal posed the question: "Where in that period was his place of abode, where was his home?" the answer inevitably would have been "in Australia at his mother's place", and the material before the Tribunal indicated that his only intention was to remain living there.

28 Counsel for the respondent contends that the Tribunal did not err in leaving out of account consideration of the appellant's presence in Australia. This submission is based on the following words in reg 1.15(2)(a)(i), namely "An applicant is disqualified if: the applicant … usually resides in the same country, *not being Australia*, as an overseas near relative" (emphasis added), and on the following passage from the judgment of Gummow J in *Gauthiez* at 521 which, it is contended, reflects those words:

> However, I prefer to base my decision upon a more direct ground. It turns significantly upon the legal effect which is to be given, in any proper consideration of the usual residence of the applicant for the purposes of the Regulations, to his illegal presence in Australia for a number of years immediately preceding the application and the decision. It was for the Tribunal to consider whether the disqualification imposed by reg 9 did not apply because, putting aside Australia, *as it had to be put aside*, the applicant did not usually reside in any country. Rather, as I have indicated, the Tribunal approached its task as if the legislation required a choice to be made between France and Belgium. This is not a case where the error of law was of no significance; it meant that the applicant failed to receive the consideration of his position which the law required (cf *Alphapharm Pty Ltd v Smithkline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250 at 265).

(Emphasis added.)

29 In our opinion this passage is not directed to the construction of reg 1.15(2)(a)(i). Australia had to be put aside in that case, not because of the express requirement of the regulation, but because the presence of the applicant in Australia after his temporary entry visa expired was illegal. This policy consideration was expressed by Gummow J at 521, saying: "the applicant cannot rely on his unlawful activities under the immigration law to secure an advantage thereunder, by establishing his usual residence in Australia."

30 It will be noted that in the definition of "overseas near relative" in reg 1.15(3), there is no requirement that a person within paras (a) and (b) is

overseas, or not usually resident in Australia. The concluding words of reg 1.15(3) confine the definition of "overseas near relative" to such of those people who are "not a relative of the kind referred to in subregulation (1)". That qualification however would not include a non-dependent step-child as a non-dependent step-child is not one of the relatives listed in subreg (1). For that reason, we think, the words "not being Australia" are included in subreg (2) to make it clear that an overseas near relative whose place of residence may disqualify an applicant is an overseas near relative who does not usually reside in Australia. We do not think that reg 1.15(2)(a)(i) requires that lawful presence of the appellant in Australia is to be left out of account in considering where the appellant usually resides.

31 In our opinion in determining whether the appellant met the criteria prescribed in Subclass 806 it was necessary for the Tribunal to take into account the appellant's presence in Australia, at least from the time when he made his application for the visa. The failure to do so has the consequence in this case that the Tribunal failed to fulfil the task that was required of it under s 65(1) of the Act. It failed to decide according to law whether it was satisfied that the criteria prescribed by the regulations had been satisfied.

Was there a failure to apply binding authority?

32 The third limb of the submissions made by the appellant's counsel is based on an alleged failure to apply the passage from the judgment of Gummow J in *Gauthiez* cited above. It is contended that the Tribunal failed to consider the possibility, putting aside the appellant's presence in Australia, that he did not usually reside in any country. In our opinion that was not the question that arose in the circumstances of this case. That question arose in *Gauthiez* because of the long period of illegal presence in Australia which could not be brought to account. As the question did not arise in this case the Tribunal did not fall into the error alleged.

33 In the present case, the appellant's presence in Australia was lawful and should have been taken into account. It seems that the Tribunal did not consider whether the appellant was usually resident in Australia. It approached its task as if the choice of place where the appellant was usually resident was between the USA and the UK. To so confine its consideration was an error of law.

Does s 474(1) protect the Tribunal's decision from review?

34 The remaining question is whether the error on the part of the Tribunal, which constituted a failure to correctly address the prescribed criteria for the visa for which application was made, constitutes an error which is not protected from review under s 474(1) of the Act. Such a decision will not be protected as a privative clause decision if it is not one made "under this Act": s 474(2).

35 In *Plaintiff S157*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ in their joint judgment said (at [76]-[78]):

> Once it is accepted, as it must be, that s 474 is to be construed conformably with Ch III of the *Constitution*, specifically, s 75, the expression "decision[s] … made under this Act" must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all". Thus, if there has been jurisdictional error because, for example, of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints", the decision in question cannot

> properly be described in the terms used in s 474(2) as "a decision … made under this Act" and is, thus, not a "privative clause decision" as defined in s 474(2) and (3) of the Act.
>
> To say that a decision that involves jurisdictional error is not "a decision … made under [the] Act" is not to deny that it may be necessary to engage in the reconciliation process earlier discussed to ascertain whether the failure to observe some procedural or other requirement of the Act constitutes an error which has resulted in a failure to exercise jurisdiction or in the decision-maker exceeding its jurisdiction.
>
> The effect of s 474 is to require an examination of limitations and restraints found in the Act. There will follow the necessity, if s 474 is constitutionally valid and if proceedings are brought by the plaintiff in accordance with the draft order nisi, to determine, in those proceedings, whether, as a result of the reconciliation process, the decision of the tribunal does or does not involve jurisdictional error and, accordingly, whether it is or is not a "privative clause decision" as defined in s 474(2) of the Act.

(Footnotes omitted.)

36 In the present case the reconciliation process to which the joint judgment refers requires an examination of the nature of the obligation imposed on the Minister, and hence the Tribunal, by s 65(1) and its relationship with s 474 of the Act. Such an examination was undertaken by Gaudron and Kirby JJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441. Their Honours dissented in the result in that case as they considered that the Tribunal was required by s 65(1) to consider all criteria specified for a visa of the kind applied for (in that case a protection visa) notwithstanding that no specific claim was made in regard to the particular criterion under which the applicants could succeed had they made their claim: see [88]. The majority, on the other hand, took the view that the Tribunal was not required by s 65(1), in the case of criteria disjunctively expressed, to reach a state of satisfaction (or otherwise) respecting criteria which the applicants did not advance in their visa application: see [31]-[32]. However, the exercise of reconciliation undertaken by Gaudron and Kirby JJ at [71]-[83] was that required by *Plaintiff S157* and has application to the present case. In particular, their Honours said (at [80]-[83]):

> It may be that there is no insuperable difficulty in reconciling a particular provision with s 474 of the Act in the case of a power to do some act or to make some decision that involves a significant discretionary element or in respect of which there is no detailed specification as to matters that must be satisfied before a particular act is done or a particular decision taken. In such a case it may be possible to construe the provision governing that act or decision as one which does not impose restraints or limitations which must be observed if the act or decision is to be valid.
>
> On the other hand, reconciliation of a particular provision with s 474 of the Act is very difficult, if not impossible, if, as in the case of s 65(1) of the Act, there is detailed specification of conditions which must be satisfied before a particular act can be done or a particular decision taken and there is also prescription of the precise act that must be done or the precise decision that must be reached if the specified conditions are met.
>
> It is important to note that s 65(1) of the Act applies to all visa applications, not merely applications for protection visas. Further, s 31 of the Act allows that "regulations may prescribe criteria for a visa or visas of a specified class" and the regulations prescribe detailed criteria for various kinds of visa …

> In light of the detailed specification in the regulations of the criteria for the grant of various classes of visa, it is impossible to treat the consideration by the decision-maker of the relevant criteria and his or her satisfaction or lack of satisfaction in that regard as other than conditions precedent to a valid decision to grant or refuse a visa under s 65(1) of the Act.

37 In the present case the appellant's application clearly identified the basis upon which he sought a visa as a remaining relative. The Minister's (and the Tribunal's) satisfaction or lack of satisfaction on that matter was a condition precedent to a valid decision to grant or refuse a visa under s 65(1) of the Act. It was not merely a procedural requirement. For the reasons given, the Tribunal fell into error in the consideration of that question and, in the result, there was a constructive failure to exercise the jurisdiction vested in it. In our opinion, that error makes this case a plain one where the decision was not made "under this Act"; thus, it is not a decision protected by s 474(1).

38 In our opinion, the appeal be allowed. The order of the primary judge dismissing the application should be set aside. There should be an order for certiorari to quash the Tribunal's decision and mandamus directed to the Tribunal to decide the case according to law. The respondent should pay the appellant's costs of the application and of this appeal.

Orders accordingly

Solicitor for the appellant: Victoria Legal Aid.

Solicitor for the respondent: Australian Government Solicitor.

RODEN PRITCHARD